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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ivanko Barbell Company

Serial No. 78134755

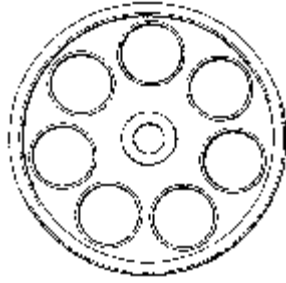
Edward A. Sokolski, Esq. for Ivanko Barbell Company.

Cynthia Sloan, Trademark Examining Attorney, Law Office 116
(Meryl Hershkowitz, Managing Attorney).

Before Hanak, Bottorff and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

Ivanko Barbell Company (applicant) filed an
application to register the mark shown below on the
Principal Register for "barbell plate with seven holes" in
International Class 28.



The application (Serial No. 78134755) was filed on June 11, 2002, and it claimed a date of first use anywhere and a date of first use in commerce of February 1, 1999. The application is described as "a three dimensional configuration of a barbell having a raised border at its circumference and seven equal size round holes that surround a central round hole having a raised border at its circumference."¹

The examining attorney ultimately refused registration on the grounds that the design is functional under Section 2(e)(5) of the Trademark Act (15 U.S.C. § 1052(e)(5)) and, that, if the mark is not functional, it is "a configuration of the goods that has not acquired distinctiveness as a source indicator for the goods" under Section 2(f) of the Trademark Act (15 U.S.C. § 1052(f)). Examining Attorney's Brief at 1. Applicant argues that the examining attorney has not demonstrated that the mark is functional and argues that it "has submitted considerable evidence showing many

¹ See Response dated January 29, 2003 at 1.

alternate designs which are equally able to perform the utilitarian task of the design.” Reply Brief at 3. In addition, applicant argues that it has shown that its design has acquired distinctiveness.

Functionality

We begin by addressing the central issue in this case, which is whether applicant’s mark is functional under the Trademark Act. The Act has been amended expressly to provide that an application may be refused registration if it “comprises any matter that, as a whole, is functional.” 15 U.S.C. § 1052(2)(5). The Supreme Court has addressed the issue of functionality in several cases both before and after this statutory change.

Discussing trademarks, we have said “[i]n general terms, a product feature is functional, and cannot serve as a trademark, if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 165 (1995) (quoting Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 850, n. 10 (1982)). Expanding upon the meaning of this phrase, we have observed that a functional feature is one the “exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage.” 514 U.S., at 165.

TraFFix Devices Inc. v. Marketing Displays Inc., 523 U.S. 23, 32, 58 USPQ2d 1001, 1006 (2001).

The Federal Circuit looks at four factors when it considers the issue of functionality:

- (1) the existence of a utility patent disclosing the utilitarian advantages of the design;
- (2) advertising materials in which the originator of the design touts the design's utilitarian advantages;
- (3) the availability to competitors of functionally equivalent designs; and
- (4) facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product.

Valu Engineering Inc. v. Rexnord Corp., 278 F.3d 1268, 61 USPQ2d 1422, 1426 (Fed. Cir. 2002), citing In re Morton-Norwich Products, Inc., 671 F.2d 1332, 213 USPQ 9, 15-16 (CCPA 1982).

We will analyze the issue of functionality using the four factors set out in Valu Engineering.

(1) Existence of a Utility Patent

Applicant's literature refers to its "new rubber plates [that] feature our exclusive E-Z lift design of which our patent has recently been allowed." However, applicant has submitted a copy of its Design Patent No. 424,140, which includes a design of barbell plate with seven holes. A design patent is not evidence of the utilitarian advantages of applicant's design.² The

² The "fact that a device is or was the subject of a design patent does not, without more, bestow upon said device the aura of distinctiveness or recognition as a trademark." In re R.M. Smith, Inc., 734 F.2d 1482, 222 USPQ 1, 3 (Fed. Cir. 1984), quoting, In re Honeywell Inc., 187 USPQ 576, 578 (TTAB 1975).

examining attorney also refers to a patent (No. 6,436,015) owned by a third party as evidence of the utilitarian advantages of applicant's design.³ The examining attorney relies on this patent as describing a weight plate "having an 'integral handle element for grasping by a single hand to effect transport of the weight.'" Examining Attorney's Brief at 4. While the patent does not teach applicant's specific design, it does provide evidence that is relevant to barbell plates, which is discussed subsequently.

(2) Advertising Materials Disclosing Utilitarian Advantages

The examining attorney argues that applicant's advertising "indicates that the barbell design possesses utilitarian advantages." Examining Attorney Brief at 5. "If a seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of functionality." 1 McCarthy on Trademarks and Unfair Competition § 7:74 (4th ed. 2004). Applicant's promotional literature expressly and frequently extols the utilitarian advantages of its design.

Ivanko® introduces [its] new E-Z Lift Plates. These new plates feature a traditional, round shape, multi opening, E-Z lift design. Our plates incorporate (7)

³ We note that although "the existence of a utility patent could weigh against applicant in terms of showing that the configuration is de jure functional, the absence of such a patent simply has no weight in our analysis." In re Gibson Guitar Corp., 61 USPQ2d 1948, 1950 n.3 (TTAB 2002).

openings, not just (2) or (3). These extra openings dramatically improve handling off the floor and on and off machines or bars.

"Ivanko E-Z Lift Plates are Hot!" ad

All the openings have smooth radius and rounded edges for maximum comfort while grapping the plates. Because they are round, there are no sharp "points" or "edges" to cut floors and damage equipment as with other "anti-roll" designs.

Id.

IVANKO's rounded, contour shape of the plate conforms better to the hand, making it easier to carry. We round all edges to make it more comfortable to hold onto.

Id.

As with all Ivanko E-Z Lift Plates, our openings have smooth radius and rounded edges for maximum comfort while grabbing the plates.

"Ivanko's E-Z lift plates are Cool!" ad

We designed this plate with more grip holes to make it easier to pick up, and therefore safer. And we kept it round for very goods reasons that have stood the test of time: ease of use and exercise safety.

Ivanko "The Evolution of Better Ideas" ad

As with all Ivanko E-Z Lift Plates, the openings have smooth radius and rounded edges for maximum comfort while grapping the plates.

Ivanko 2000

Ivanko has Rubber E-Z Lift Plates that feature a seven-hole design for easier handling.

Yahoo! Shopping

Applicant argues that these ads "do not specifically state that the seven [hole] designs per se are needed to enable lifting and carrying of the plate." Reply Brief at 2. In order to be functional, it is not necessary to prove that the design for which applicant seeks registration "is

necessary to enable lifting and carrying of the plate.” Obviously, weight plates were lifted and carried prior to applicant’s design. We point out that the Supreme Court rejected the argument that “a necessary test for functionality is whether the particular product configuration is a competitive necessity.” TrafFix, 58 USPQ2d at 1006 (internal quotation marks omitted). See also Valu Engineering, 61 USPQ2d at 1427 (“We did not in the past under the third factor require that the opposing party establish that there was a ‘competitive necessity’ for the product feature”).

Here, applicant’s literature and other materials make it clear that applicant touts the utilitarian advantages of its seven-hole design. “Our plates incorporate (7) openings, not just (2) or (3). These extra openings dramatically improve handling off the floor and on and off machines or bars.” In addition to improving handling, applicant has also explained that “[w]e designed this plate with more grip holes to make it easier to pick up, and therefore safer.” In other words, the seven-hole design according to applicant makes it easier to handle the plates and this ease in handling makes it safer. Reinforcing applicant’s advertising, the Yahoo Shopping article again

reports that applicant's weight plates feature "a seven-hole design for easier handling."

Regarding the round holes and the rounded, contour shape of its plate, applicant's advertising again makes it clear that they serve an important utilitarian purpose:

All the openings have smooth radius and rounded edges for maximum comfort while grapping the plates. Because they are round, there are no sharp "points" or "edges" to cut floors and damage equipment as with other "anti-roll" designs.

[O]ur openings have smooth radius and rounded edges for maximum comfort while grabbing the plates.

And we kept it round for very goods reasons that have stood the test of time: ease of use and exercise safety.

IVANKO's rounded, contour shape of the plate conforms better to the hand, making it easier to carry. We round all edges to make it more comfortable to hold onto.

As with all Ivanko E-Z Lift Plates, our openings have smooth radius and rounded edges for maximum comfort while grabbing the plates.

Applicant's advertising, after referring to the utilitarian advantages of its products such as "more grip holes to make it easier to pick up" and roundness for "ease of use and exercise safety," concludes with the following statement: "Coming up with better ideas is not just a process, it's an attitude - one of never being satisfied with the way things are, of always striving to give the marketplace something better." Ivanko "The Evolution of

Better Ideas" ad. The same ad goes on to explain that the item shown is "Available in 45 lb, 35 lb. & 25 lb. sizes. Companion 10 lb., 5 lb., & 2.5 lb. sizes available without grip holes." A customer confronted with these advertisements would associate applicant's design with a superior, utilitarian product.

"Rather than showing that the configuration design serves to distinguish source, this advertising touts the design for its desirable, superior utilitarian qualities." In re Caterpillar Inc., 43 USPQ2d 1335, 1340 (TTAB 1997). In this case, the design is advertised as an improved design that dramatically improves ease of handling and safety. This evidence strongly supports the examining attorney's argument that the design is functional.

(3) Alternative Designs

Regarding the third factor, the Federal Circuit has explained that:

We did not in the past under the third factor require that the opposing party establish that there was a "competitive necessity" for the product feature. Nothing in TrafFix suggests that consideration of alternative designs is not properly part of the overall mix, and we do not read the Court's observations in TrafFix as rendering the availability of alternative designs irrelevant. Rather, we conclude that the Court merely noted that once a product feature is found functional based on other considerations there is no need to consider the availability of alternative designs, because the feature cannot be given trade dress protection merely

because there are alternative designs available. But that does not mean that the availability of alternative designs cannot be a legitimate source of evidence to determine whether a feature is functional in the first place.

Valu Engineering, 61 USPQ2d at 1427 (footnote omitted).

Applicant argues that it has "submitted considerable evidence showing many alternative designs which are equally suitable to perform the utilitarian task of the design." Reply Brief at 3. Certainly, applicant's own advertisement would argue that applicant's design is a superior design. In fact, applicant has compared its design to the evolution of man with applicant's seven-hole plate shown as a superior plate to the earlier plates having fewer holes. Again, the ad describes its weight plates as giving "the marketplace something better." It is hard to argue with applicant's own statement that "more grip holes [] make it easier to pick up." Applicant's design appears to balance the need to have plates weighing up to 45 pounds, with the most number of gripping holes for ease of lifting and safety.⁴ To achieve these advantages, the holes cannot be minimized beyond the size of those that can accommodate a

⁴ Applicant does not use the "gripping holes" on its smaller (10, 5, and 2.5 lb.) weights where lifting the weights would not be as difficult.

user's hand or fingers. Applicant's statement that there are equal alternative designs is contradicted by its statement that its plates "incorporate (7) openings, not just (2) or (3).⁵ These extra openings dramatically improve handling off the floor and on and off machines or bars."

The fact that there are alternative designs is hardly surprising, or in and of itself, legally sufficient. The evidence of record clearly demonstrates that weight plates have been around for many years. The question is not whether there are alternative designs that perform the same basic function but whether these designs work "equally well." Valu Engineering, 61 USPQ2d at 1427, quoting, 1 McCarthy on Trademarks and Unfair Competition, §7:75, 7-180-1 (4th ed. 2001). Clearly, the Supreme Court found that it was improper to engage in "speculation about other design possibilities, such as using three or four springs which might serve the same purpose ... [or] to explore designs to hide the springs." TrafFix, 58 USPQ2d at 1007.

Here, applicant touts its design as a superior, utilitarian design. While weight plates can be made in

⁵ Regarding the central hole and roundness of the weight plates, "[t]raditionally weight plates are generally disc-shaped, and formed with a central throughbore sized to slidably receive the end of the bar." Patent No. 6,436,015 B1 col. 1, lines 28-30. The patent (Col. 1, lines 54-58) also indicates that "conventional wisdom" also taught that the design of the openings "preserve axially balancing of the plate."

many forms and with less than seven grip holes, the evidence, much of it from applicant, shows that applicant's design works better. It provides additional holes to ease gripping and moving the plates and these grips contribute to the ease and safety of their use.

- (4) Facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product

There is no indication that applicant's design results from a simple or cheap method of manufacturing the product and, thus this fact does not favor applicant or the examining attorney. Applicant argues that "the design with seven holes is more expensive[,] more complicated and does not result from a superior method of manufacturing the article." Reply Brief at 3. However, the focus in this factor is on whether the design results from a simple or cheaper manufacturing process. When a design results from a simple or cheaper manufacturing process, if competitors are barred from using the resulting design, they would be barred from using the process itself. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 114 (1938) ("The plaintiff has not the exclusive right to sell shredded wheat in the form of a pillow-shaped biscuit--the form in which the article became known to the public. That is the form in which shredded wheat was made under the basic

patent. The patented machines used were designed to produce only the pillow-shaped biscuits"). Obviously, there is no indication that applicant's design results from this type of manufacturing process.

Applicant's argument that its design process is more expensive is not, by itself, significant. Merely because a product costs more to manufacture than other products does not mean that the design is not functional. Indeed, improving the utilitarian features of a product often dictates that the manufacturing process be more expensive or complicated. For example, in this case, most likely the cheapest manufacturing process to produce a functional weight plate would be to pour the molten metal into a simple mold that would leave a single hole to attach the weight plate to a bar. However, the evidence indicates that this simple or cheap manufacturing process is not completely satisfactory. Although traditional weight plates "have succeeded in carrying out their intended purposes, there are many areas for substantial improvement. A key problem often associated with traditional weight plates involves the transport of individual plates from one location to another." Patent No. 6,436,015 B1, Col. 1, lines 31-36. Thus, an applicant's incantation of the statement, "my goods cost more to manufacture," is by

itself meaningless. It is just as likely, if not more likely, to be an indication that the goods have utilitarian advantages as it is that the goods are not functional.

The record indicates that most of the beverage containers sold by applicant are traditional smooth-wall cans, not fluted cans. While this might be taken as an indication that fluted cans are not simpler or cheaper to make, it could well be that applicant's decision to continue making smooth sidewall cans has nothing to do with cost, and everything to do with the preferences of its customers. Even assuming that the process by which applicant makes its fluted beverage containers is not cheaper or simpler, this does not mean that the design is not de jure functional.

In re American National Can Co., 41 USPQ2d 1841, 1844-45 (TTAB 1997). See also In re Pingel Enterprise Inc., 46 USPQ2d 1811, 1821 (TTAB 1998) ("That applicant, despite the inherent advantages of a design which is simple and less expensive to manufacture than other petcocks, has, however, deliberately chosen a more complex and expensive manner in which to manufacture its product does not mean that the configuration thereof is not de jure functional. Specifically, as stated in the Pingel affidavit, that applicant has decided to produce its petcock by employing the more involved and costlier process of having it 'machined from extruded aluminum or brass stock' rather than utilizing, as is the case with '[m]ost valves manufactured by competitors [,] ... a cheaper die cast

process,' does not serve to avoid a finding of de jure functionality for its product configuration"); In re Bio-Medicus Inc., 31 USPQ2d 1254, 1265 (TTAB 1993) ("In essence, because the principle of operation employed in a vaned pump is so different from that used in a bladeless pump, the difference in sales prices for such goods are more reflective of the advanced technology developed by applicant than a meaningful indication that the configuration of applicant's blood pumps is not functional in law"); Caterpillar, 43 USPQ2d at 1341 ("[E]ven if it is true that tractors with the elevated sprocket configuration design are more costly to manufacture than tractors with conventional elliptical track designs, this does not mean that the design is not de jure functional. As noted above, the conventional track designs lack the utilitarian advantages of applicant's design -- thus, such a comparison in terms of cost is not probative. That is to say, there is nothing in the record regarding the manufacturing costs of any alternative designs that can perform the same utilitarian function equally well").

Here, the evidence supports the conclusion that to achieve the utilitarian advantages of ease of handling and safety, applicant's goods cost more to manufacture. This

evidence does not support applicant's argument that its design is not functional.

Functionality Analysis

As required by the statute, we must consider whether applicant's design as a whole is functional. 15 U.S.C. § 1052(2)(5). Here, the evidence supports the examining attorney's position that the design is de jure functional. Applicant touts the utilitarian advantages of safety and ease of handling of its design. In re Babies Beat Inc., 13 USPQ2d 1729, 1730 (TTAB 1990) ("[I]n reviewing applicant's own literature, we find that the degree of design utility encompassed by applicant's design is so great such that applicant's design is de jure functional, and hence not entitled to registration as a trademark"). There is no indication that any alternative design would operate as well as applicant's design. Obviously, other designs would work, but applicant's design with seven rounded grip holes would have superior qualities for those particularly interested in ease of handling and safety. The Supreme Court has made it clear that a "functional feature is one the exclusive use of which would put competitors at a significant non-reputation -related disadvantage." TraFFix, 58 USPQ2d at 1006 (internal quotation marks omitted). Competitors desiring to compete with applicant

in the area of ease of handling and safety would be at a non-reputation-related disadvantage if they could not use the seven hole design that applicant advertises as dramatically improving handling and safety. Therefore, the examining attorney has met her burden of establishing a prima facie case of de jure functionality. R.M. Smith, 222 USPQ at 3. Furthermore, applicant has not rebutted the examining attorney's prima facie case. Therefore, the examining attorney's refusal under Section 2(e)(5) is affirmed.

Acquired Distinctiveness

We now turn to the issue of acquired distinctiveness. "Because applicant's designs are functional, any evidence of distinctiveness is of no avail to applicant in support of registration." M-5 Steel Mfg. Co. v. O'Hagin's Inc., 61 USPQ2d 1086, 1097 (TTAB 2001). However, for the sake of completeness, we will discuss applicant's contention that its design has acquired secondary meaning.

The Supreme Court has explicitly held that product "design, like color, is not inherently distinctive." Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). Applicant's design is a product design for applicant's weight plates and it would,

if it is not functional, be registrable only if applicant shows it has acquired distinctiveness.

Applicant has the burden of proving that its mark has acquired distinctiveness. In re Hollywood Brands, Inc., 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"). "[L]ogically that standard becomes more difficult as the mark's descriptiveness increases." Yamaha Int'l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988).

However, the statute is silent as to the weight of evidence required for a showing under Section 2(f) except for the suggestion that substantially exclusive use for a period of five years immediately preceding filing of an application may be considered prima facie evidence.

As observed by our predecessor court, the exact kind and amount of evidence necessarily depends on the circumstances of the particular case, and Congress has chosen to leave the exact degree of proof necessary to qualify a mark for registration to the judgment of the Patent Office and the courts. In general, the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.

Id. (quotation marks, brackets, and citations omitted).

Applicant's most significant piece of evidence that its mark has acquired secondary meaning is a document

entitled "Ivanko Barbell Weight Plates Secondary Meaning Survey." The survey (p. 19) concludes with the following statement: "These survey results show that in the relevant market, a high percentage of purchasers of barbell weight plates associate the appearance of Ivanko Barbell weight plates in question (E-Z Lift Plates) with one company, Ivanko. Of the survey respondents who were familiar with the Ivanko barbell weigh weight [sic] plate in question with all indicia removed (Picture A-1), 58.65% associated the appearance of the barbell weight plate shown with Ivanko and an additional 8.65% associate it [with] one company."

On its face, the survey does appear to indicate a high rate of trademark recognition for applicant's design but several factors undercut the weight that we give the survey. First, the survey ultimately analyzed only a total of 117 responses. Survey, p.1. Second, all the interviews occurred at two events, the Club Industry Show East 2002 titled "The Conference & Exposition of Health & Fitness Facility Management" trade show in Washington, D.C. and the "Health & Fitness Business Expo + Conference" in Denver, Colorado, also in 2002. Third, the survey was limited to participants who "work for a health club, gym, spa or an exercise equipment manufacturer which purchases barbell

equipment." Survey, Question 2a. As a result of this limitation and the fact that the survey was conducted at two industry conferences, 83.76% (or a total of 98) respondents were overwhelmingly senior officers and managers of fitness business (fitness director/fitness professional, owner/president, manager/general manager, sales manager/sales rep, CEO, vice president, or director of activities/director of facilities). Survey, Summary Table D. In the survey, 45% of the participants were self-identified as owners, presidents, vice-presidents, CEOs, managers and general managers of health clubs, gyms, spas, or exercise equipment manufacturers. Applicant's survey has selected a survey that is limited to only a small percentage of potential purchasers. Ty Inc. v. Softbelly's Inc., 353 F.3d 528, 69 USPQ2d 1213, 1215 (7th Cir. 2003) ("[T]he survey was worthless – 13- to 18-year-old girls being an arbitrary subset of consumers of beanbag stuffed animals"). Undoubtedly, among this small group, applicant's design has achieved some recognition. However, even among this group, the responses often tend to identify the utilitarian advantages of the design. See Responses Nos. 119 ("easy to grab"), 107 (It has holes so the person can carry it – safety reason"), 117 (It has easy grip), 106 ("You can grab it with less chance of dropping it on your

feet'); 116, 602, 110, 115, 602, 201, 206, 207 ("easy grip[s]"); 126 ("The holes for carrying"); 124, 131, 212 ("easier to grip"); 134 ("the holes in it that it's easy to pick up"); 137 ("ease of carrying them away"); 149 ("can pick up easier"); and 114 (easy for grasping"). Inasmuch as applicant's advertisements refer to "it's new patent pending E-Z Lift Plates" and its "exclusive E-Z lift design of which our patent has recently been allowed," potential purchasers are likely to view applicant's advertisements as simply touting its improved design, and these responses recognize applicant's technical improvements and not trademark recognition.⁶

While the survey is evidence that a very small group of potential purchasers (owners, presidents, vice-presidents, and general managers of health/racquet and fitness clubs) may recognize the applicant's design as a trademark,⁷ we have little, if any, evidence of whether the

⁶ While applicant received a design patent and never apparently sought utility patent protection, this distinction is likely to be lost on potential purchasers since these ads tout the utilitarian advantages of applicant's design.

⁷ Applicant argues that the "average 'user' of barbell plates, as determined by the organization making the survey, is not generally the purchaser of such equipment, the purchasers generally being persons who work for health clubs, gyms..." Reply Brief at 3. The survey states without explanation that the "relevant market" was defined as "individuals who work for a health club, gym ... These are the types of persons who would be likely to purchase barbell weight plates." Survey at 9-10. Applicant's goods are not restricted to commercial barbells.

broader group of prospective purchasers would recognize applicant's design as a trademark. We note that applicant's goods are identified as barbell plates without any limitation as to prospective purchasers. There is also evidence that barbells are sold in a wider market than simply owners, general managers, and corporate officials of health and fitness clubs. For example, the Yahoo Shopping site simply identifies applicant's goods under the subheadings: "Home > Sports and Outdoors > Reviews > Free-Weight Sets > Hammertone Set Ivanko." The description of the weights is list as:

Ivanko has Rubber E-Z Lift Plates that feature a seven-hole design for easier handling. If you hate the sound of dropped plate makes - or if you worry about dinging the floor or equipment with metal plates - these could be a good choice for you. Expect to pay nearly double for this convenience and new design. If aesthetics really count, take a look at Ivanko's OMC-302 Olympic Chrome set of plates and bar bell. They're gorgeous and reasonably priced at \$250. Caution - chipping could be a problem with heavy use.

The advertisements for competitors such as Troy and VTK appear to be directed to ordinary purchasers.

There is nothing inherent in barbells that would limit their sale to the limited class of purchasers applicant has selected. Certainly, the individuals applicant has selected would purchase weight plates but the class of purchasers who would purchase barbell weight plates would appear to include numerically many more purchasers than the limited group applicant has chosen to survey.

Therefore, we consider the survey as evidence of some trademark recognition but we give it only limited weight because of the small sample of prospective purchasers included within the survey.

We also consider the evidence that applicant has sold a total of nearly \$531,000 of these products between 1998 and May 2003.⁸ Applicant's advertising figures are not associated with a particular product and are of limited probative weight.⁹ We do not consider that applicant's sales and advertising evidence is particularly strong.

When we consider the survey concerning secondary meaning that surveyed primarily health club officers and managers, applicant's limited sales and advertising, and the many utilitarian features of the design that are often recognized by survey participants, we conclude that applicant has not met its burden of demonstrating that its mark has acquired distinctiveness.

Decision: The examining attorney's refusal to register applicant's design on the Principal Register on the basis that it is functional is affirmed. If the mark is not functional, the examining attorney's refusal to

⁸ Applicant's highest yearly sales was nearly \$159,000 in 2001.

⁹ Applicant's declarant indicated that its "advertising expenses of this and other plates during 2002 and 2003 ... totaled \$401,368."

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register the mark on the ground that it has not acquired distinctiveness is also affirmed.